IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 27, 2007

STATE OF TENNESSEE v. THOMAS WHITTENBERG

Direct Appeal from the Criminal Court for Knox County
No. 84540B Mary Beth Leibowitz, Judge

No. E2007-00625-CCA-R3-CD - Filed February 27, 2008

The appellant, Thomas Whittenberg, pled guilty in the Knox County Criminal Court to accessory after the fact of first degree murder and arson. The plea agreement provided that the appellant would be sentenced as a Range II multiple offender to concurrent four year sentences on each count. The appellant applied for probation, which application was denied. On appeal, the appellant challenges the denial of probation. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Russell T. Greene, Knoxville, Tennessee, for the appellant, Thomas Whittenberg.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The appellant was initially indicted by the Knox County Grand Jury for felony murder and especially aggravated robbery. Later, the indictments were amended to reflect charges of accessory after the fact of first degree murder and arson. Shortly thereafter, the appellant pled guilty to the charges in the amended indictment in exchange for concurrent sentences of four years as a Range II offender on each count. The plea agreement further reflected that the appellant would seek probation.

At the guilty plea hearing, the State recited the following factual basis underlying the

appellant's convictions:

> In early March 2006, Jimmy Mynatt murdered Fred Thomas in the commission of a robbery at Mr. Thomas' residence. As the Court can take judicial notice, Mr. Mynatt was convicted by a jury in this court on November the 29th of 2006 of felony murder.
>
> Your Honor, please, proof would be that [the appellant] assisted Mr. Mynatt after the commission of this offense in disposing of property taken from Mr. Thomas' property, including a truck that belonged to Mr. Thomas, and a safe, which contained a quantity of cash, medications, and weapons.
>
> The proof would be that [the appellant] accompanied Mr. Mynatt and Ivan Lynn Baird to a location in Knox County, Tennessee, that they purchased accelera[nt] at a Wal-Mart Store on Clinton Highway, that they drove to a remote location and set Mr. Thomas' truck on fire. And the safe and the truck – the remains of the truck and the safe were found by officers of Knoxville Police Department.
>
> Your Honor, please, Patti Tipton was a detective in this case, she would testify to the events. Ivan Lynn Baird, as the Court will note, testified at the trial of Mr. Mynatt and that would be – that would be his testimony as well. He had agreed to cooperate in the prosecution of both Mynatt and [the appellant].
>
> Your Honor, please, further proof would be that [the appellant] was instrumental in assisting Mr. Mynatt in disposing of this evidence of the homicide. And that he knowingly participated in the destruction of Mr. Thomas' property, and that he didn't have permission to do so. All of these events occurred in Knox County.

At the appellant's probation hearing, the State asserted that the appellant was not a proper candidate for probation. The State contended that the appellant was a Range II offender who committed the instant offenses while on probation for forgery convictions, leading to a probation revocation on the forgery convictions. Additionally, the State noted that "[t]here is no question that he suffered from a serious drug habit." The State maintained that the appellant committed the instant offenses with "complete indifference to what had happened to Fred Thomas"; therefore, the State contended that the nature of the crimes indicated that the appellant was not amenable to correction. The State said, "This is a special case. His conduct was egregious, and we just feel that he needs to go to jail for the short sentence that we were able – we were able to get."

Defense counsel argued that the appellant had attended college and had a good work history until the instant offenses. Defense counsel acknowledged that once the appellant started doing drugs, he "started spiraling down." Defense counsel stated that the appellant was currently clean and sober. Defense counsel told the court that the appellant "would like to have time to get into a half-way house because . . . he is an intelligent man . . . [who] knows that he's got to correct his behavior." Defense counsel asked the court "to maybe put [the appellant] on some kind of split confinement or put him in a half way house till he can get everything put together." Defense counsel said that the appellant did not "want to go back into the environment he came from . . . so that he doesn't screw up."

The appellant spoke on his own behalf, telling the court, "I don't want this lifestyle." The appellant said that the offenses did not happen the way the State alleged. Instead, the appellant maintained:

> I refused, you know, all of it. I was living at the Baird house at the time of this crime, you know. That's where I stayed. I worked as a manager for Weigle's. I didn't know of the crime that was going to happen, ma'am. I did not, you know.
>
> . . . .
>
> I didn't know the man had been shot, no, ma'am, not until I was already incarcerated. They told me – the detective had told me about it. . . . I'm not lying.
>
> . . . .
>
> And I'm sorry it happened, truly sorry, you know. I'm sorry that anyone lost their life, you know, over any kind of drugs, you know. And I'm beggin', you know, askin' for help.

The trial court stated that regardless of whether the appellant was being truthful about what he knew about the murder, "he certainly, under the facts that I have heard over and over, is absolutely guilty of accessory after the fact of a murder." The court observed:

> [The appellant] is an educated man. He has a family that he's not supporting. He's doing a lot – he hasn't done a lot of things that he needs to do. He's capable of working. And there's a lot of things that [the appellant] can do for himself to change this way that we've gotten into.
>
> . . . I think the sanest thing I can do on these Class E felonies is send [the appellant] to the penitentiary, let him come out on parole because

> he will, and let go get himself some help and get him a job and do his thing and not be under a supervision.
>
> . . . There's lots of programs he can go to, and [the appellant] can do this for himself. He's not one of these guys that I have to lead by the hand because he's not bright enough. [The appellant] **knows** where he is right now in his head. He knows what the drugs do.
>
> In this case the drugs lead to a murder. Now, whether or not [the appellant] did it or knew about it ahead time or whatever, [the appellant] spiraled so far down that we got all the way to a violent offense for which he is an accessory after the fact. And he is a Range II offender legitimately. He had had prior history. He knows what he's got to do. He's able to work. He's able to take care of this for himself. And he can go into the drug program if he want[s] to at the penitentiary while he's waiting. So I'm going to just let him finish out his sentence.

On appeal, the appellant challenges the trial court's denial of probation.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2006). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

An appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant was convicted of Class E felonies and received sentences of four years ; however, he was sentenced as a Range II offender. Therefore, he is not presumed to be a favorable candidate for alternative sentencing. Regardless, an appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006).

As we earlier noted, we must review the presentence report when conducting our de novo review of the manner of service of a sentence. However, despite intimations at the sentencing hearing that there was a presentence report which was prepared and then considered by the trial court, the presentence report is not in the appellate record for our review. We cannot, based upon the limited record before us, properly review the denial of probation. The appellant carries the burden of ensuring that the record on appeal conveys a fair, accurate, and complete account of what has transpired with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b); see also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Thus, given the limited appellate record, we presume that the trial court correctly denied probation. State v. Rodney Welch, No. W2004-00789-CCA-R3-CD, 2005 WL 357902, at *3 (Tenn. Crim. App. at Jackson, Feb. 15, 2005).

III. Conclusion

Based upon the foregoing, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE